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IN THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA
October Term, 1965

NO. 1319

SECURITY LIFE INSURANCE COMPANY
OF AMERICA,

Petitioner,

versus

W. C. JENNINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Petitioner

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Security Life Insurance Company of America, your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 25, 1966.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Alabama entered December 31, 1963 (R. 409-421) is reported in 250 Fed. Supp. 164. The opinion of the Court of Appeals for the Fifth Circuit entered February 25, 1966 has not yet been officially

reported and is printed in Appendix A to this petition. Petition for rehearing was denied on March 29, 1966 without opinion.

JURISDICTION

The judgment of the court below was entered on February 25, 1966. A timely petition for rehearing was denied on March 29, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254 (1).

QUESTIONS PRESENTED

After discovery produced certain records of a governmental agency, an amended complaint was filed. The District Judge did not decide the issues raised by this amendment, but undertook to decide only the issues raised by the original complaint. The opinion showed on its face it was based upon a misconstruction of a written document. The Court of Appeals affirmed on the theory that the correct result was reached. The questions presented are:

1. Where the correctness of the lower court's decision depends upon a determination of fact which has not been made by the trier of fact, is it proper appellate procedure for the Court of Appeals to make such determination of fact from conflicting evidence.

2. Where the lower court fails to consider and decide the issues made by amended pleadings, is it proper appellate procedure for the Court of Appeals to make the determination of facts necessary to permit it to conclude that the correct result was reached.

3. Where the conflicting evidence would justify a contrary result, should the Court of Appeals affirm a decision containing material errors apparent on the face of the record under the rule that the decision should be affirmed if the correct result was reached.

4. Does the Statute, 28 U. S. Code 2111, permit or require the Courts of Appeal to make initial determinations of fact not made by the court below.

STATUTES INVOLVED

The only statute involved is 28 U. S. Code, Sec. 2111, which provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT

On November 11, 1960, the Petitioner purchased from the respondent a building at 400 Lee Street in Montgomery, Alabama, then occupied as Regional Office of the Veterans Administration. The lease then existent on the property would expire on June 30, 1962.

In the fall of 1961, it became known that the Veterans Administration did not intend to renew said lease or to continue in possession of the premises.

On August 28, 1962, petitioner filed the original complaint in the District Court for the Middle District of Alabama, seeking rescission of the purchase on the

ground of fraud and misrepresentation. Federal Court jurisdiction was based upon diversity of citizenship and is not in question.

The original complaint was based upon concealment of the fact that the seller had sought to secure an extension or renewal of the lease and had failed to do so; (R. 3, 5), and had represented that Defendants had no knowledge of any reason why the lease would not be renewed, (Second Cause of Action R. 4).

The defendant Jennings pleaded the general issue and special pleas not here of concern. The Court below, on October 12, 1962, then entered order on Pre-Trial hearing, setting out the issues then made by the pleadings, (R. 31-35).

Thereafter, through discovery proceedings, petitioner secured access to the records of General Services Administration which handled the lease on the property. Included in these files was a letter of March 30, 1960, (App. B, p. 1), showing that the owners had been advised of tentative plans to acquire new and improved space upon expiration of the present lease. Also obtained was a copy of letter of November 23, 1960, (App. B, p. 2-6), requesting program and fund approval to move "effective July 1, 1962."

Petitioner then on May 15, 1963 filed amended complaint, adding a Fourth Cause of Action, (R. 51-56). In addition to the issues, as reflected in the Pre-Trial Order of October 12, 1962, this amendment specifically charged that Defendant had been apprised of the tenant's plans to relocate and concealed the tenant's "tentative plans to relocate into other prem-

ises," (Par. e and f, R. 54). No Pre-Trial Conference was held after this amendment.

The cause was submitted on June 6, 1963. On December 31, 1963, the District Judge rendered judgment in favor of the defendant. The Opinion (R. 410, 250 Fed. Supp., p. 164) copied the issues to be decided from the Pre-Trial Order of October 12, 1962, and made no reference to or attempt to decide the issues raised by the Fourth Cause of Action.

This Opinion (R. 417), contained an inexplicable material error apparent on its face. The letter of November 23, 1960, (App. B, p. 6), specifically required program and fund approval to move "into a new leased facility . . . effective July 1, 1962." The District Court construed this as a request

> "for a program and fund approval for a new federal building in Montgomery, Alabama. This request asked that the program 'be phased out in a six to ten year period.' Thus, it was impossible, in view of the chronology of events reflecting the Government's intentions, for Jennings or any of those acting for or upon his behalf to know, or even have any basis for believing, on November 11, 1960, that the Government intended to vacate 400 Lee Street." (R. 418, 250 Fed. Supp. at p 168)

Appeal was duly taken to the Court of Appeals for the Fifth Circuit and these material errors were assigned. The case was argued and submitted to that Court on November 20, 1964. Fifteen months later, with no reference to these material errors apparent on the face of the record, that Court affirmed on the "view that the correct result was reached," (App. A).

Petition for rehearing was promptly filed. This petition pointed out the probable conflict with the decision of this Court in *Securities and Exchange Commission v. Chenery,* 318 US 80; the probable conflict with the decision of the Eighth Circuit in *Spann v. Commercial Standard Ins. Co.,* 82 F. 2d 593, 600; the construction of 28 U. S. Code 2111, under the rule of *McCandless v. United States,* 298 US 342, 347-8. This petition for rehearing was denied on March 29, 1966 without opinion.

REASONS FOR GRANTING THE WRIT

1. The petition brings before the Court an important question of federal appellate procedure which should be settled by this court.

2. The Court of Appeals so far departed from the usual course of federal appellate procedure as to call for the exercise by this Court of its power of supervision.

3. The Court of Appeals departed from its function as a court to review the decision below to see if material error had been committed; and assumed the function of a trial court to make an original determination of disputed issues of fact.

4. The decision of the Fifth Circuit fails to apply the rule of *McCandless v. United States,* 298 U. S. 342, that an erroneous ruling relating to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. It is in conflict with the decision of this Court in *Securities and Exchange Commission v.*

Chenery, 310 U. S. 80, 88, where it was held that the rule of affirmance, if the result was correct, should not be applied if such correctness depended upon a determination of fact which only the trier of fact could make, but which has not been made. The decision of the Fifth Circuit also conflicts with the decision of the Eighth Circuit in *Spann v. Commercial Standard Ins. Co.,* 82 F. 2d 593.

5. The District Judge failed to pass on the issues made by the amended complaint. The reason assigned by the District Judge for his conclusion was a patent misconstruction of the letter of November 23, 1960, (App. B, p. 6). These material errors required reversal unless it affirmatively appeared that they were not prejudicial. To determine that the correct result was reached in spite of these material errors necessarily required the Court of Appeals to make an initial determination of fact from evidence which it did not hear. In *Securities and Exchange Commission v. Chenery,* 310 U. S. 80, 88, this Court applied to appeals from administrative bodies, the same rule applicable to jury trials, that the appellate court could not make a determination of fact properly made only by the trier of fact. Unless the same rule is applied to appeals in equity cases tried without a jury, the Courts of Appeal will be required to try every case de novo on the printed record and become trial courts rather than courts of review.

The question presented is of continuing importance to the administration of justice and to orderly appellate procedure.

CONCLUSION

To make effective the holding in *McCandless v. United States* and *Security and Exchange Commission v. Chenery*, and to assure uniform appellate procedure in the various circuits, the petition for a writ of certiorari should be granted.

Respectfully submitted

Jack Crenshaw

Attorney for Petitioner

May 6, 1966

Jack Crenshaw
Suite 206 Washington Building
Montgomery, Alabama

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Messrs. Walter Knabe and M. Roland Nachman, Attorneys for Respondent, by mailing a copy thereof, postage prepaid, to them at their respective addresses, 57 Adams Avenue, Montgomery, Alabama, and First National Bank Building, Montgomery, Alabama, on this the 6 day of May, 1966.

Jack Crenshaw

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21305

SECURITY LIFE INSURANCE COMPANY
OF AMERICA,

Appellant,

versus

W. C. JENNINGS,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF ALABAMA.

(February 25, 1966.)

Before JONES and BELL, Circuit Judges, and
HUNTER, District Judge.

PER CURIAM: In this diversity case the findings and conclusions of the district court are set forth in its opinion in *Security Life Insurance Company of America v. W. C. Jennings*, ... F. 2d Supp. . . . . It is our view that the correct result was reached by the district court and, therefore, its judgment is

AFFIRMED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX B

1

Mr. Neil R. Smart
Manager, Veterans Administration
Regional Office
400 Lee Street
Montgomery 4, Alabama

March 30, 1960
4 PBA

Dear Mr. Smart:

Thank you for your letter of March 14 concerning space for the VA Regional Office, Montgomery, Alabama.

We have informally advised one of the owners of the Bear Building that our tentative plans contemplate the acquisition of new and improved space for your agency upon expiration of the present lease. However, since this proposed action is only in the preliminary planning stage, subject to detailed study, documentation, and subsequent approval by higher authorities, this information should be regarded as administratively confidential.

The cooperative and understanding attitude reflected in your letter is genuinely appreciated. You may be assured that we will endeavor to improve your space at the earliest practicable date so as to provide more efficient and comfortable working conditions for all of your employees.

I am looking forward to meeting you and trust that you will be able to visit Atlanta in the near future.

Sincerely yours

W. H. SANDERS
Regional Director
Public Buildings Service

CC: 4 PD-2
4 PAO
4 PR

November 23, 1960
4 PBA

Asst. Commissioner for Buildings Management,
P.B.S., GS Building, Washington, D. C.

Regional Director, PBS,
Atlanta, Georgia

Request for Program and Fund Approval
Consolidated Project, Montgomery, Alabama

I. *Background*

The Community Plan for Montgomery, Alabama, is being revised and will be submitted to your office in the immediate future. This request for program and fund approval is in accordance with the revised community plan.

A new Federal Building has been proposed for Montgomery but is recommended to be phased in a six to ten year period. Therefore, the plan presented herein will have no adverse effect upon this project.

To provide you with information on the buildings under consideration in this memorandum, the following data are given:

A. *BEAR BUILDING.* This structure is approximately 60 years old and prior to occupancy by the Veterans Administration Regional Office on April 15, 1947, was used as a lumber supply warehouse. The entire net rentable area of 88,510 square feet is assigned to the VA. As its former use implies, the building is located in a warehouse section

of the city and is non-functional, which precludes an efficient layout. It also provides minimal net usable area, presents a very unbecoming appearance, and creates a constant source of maintenance complaints.

The annual rental rate for the Bear Building is $179,600, plus $10,000 per annum for electricity, or $2.14 per square foot completely serviced. (This does not include the cost for guard service.)

A detailed study of the VA Regional Office activities was made and a templated layout prepared for a hypothetical building. This layout shows that the agency can be efficiently housed in a new functional building in approximately 68,000 square feet, or approximately 20,510 square feet less than that now assigned.

Our lease on the Bear Building expires June 30, 1962, and if the agency is to be provided space in a new location, it is necessary that all clearances be completed by the first of the calendar year.

B. *OLD POST OFFICE BUILDING.* This building was erected in 1885 and, although structurally sound, it has outlived its functional use. It is in the heart of downtown Montgomery and provides little parking space.

Of 42,700 square feet gross area, only 22,475 square feet are not assignable for agencies use.

The lower floors have been provided with window airconditioning units, but a central cooling system is not practical due to the cost involved.

Operating costs are approximately $30,600 and minor repairs $3,600 per year. In addition, $14,000 is earmarked for interior and exterior painting in Fiscal Year 1962.

We recommend that these two outdated, nonfunctional buildings be vacated. The lease on the Bear Building should be allowed to expire on June 30, 1962, and the Old Post Office Building declared excess and disposed of on the open market.

II. *Present Situation*

In addition to the VA Regional Office, we also propose to relocate Selective Service System State Headquarters and Farmers Home Administration into the new leased facility.

A tabulation of the details of the proposed consolidation is as follows:

Agency	*Present Area*	*Present Cost*	*Proposed Area*	*Proposed Cost*	*Additional Cost*
Veterans Administration	88,510	$189,600	68,000	$238,000	$48,400
SSS, State Headquarters*	10,000	14,000	6,700	23,450	9,450
Farmers Home Adm.	2,800	7,003	2,650	9,275	2,272
ASC State Office*	8,146	Old P.O.	7,000	24,500	24,500
ARS	1,961	Old P.O.	2,800	9,800	9,800
Plant Pest Control	668	Old P.O.	700	2,450	2,450
Agri., Grain Branch	1,186	Old P.O.	1,500	5,250	5,250
Federal Crop Insurance	2,723	Old P.O.	1,600	5,600	5,600
H&H Finance*	1,376	Old P.O.	700	2,450	2,450

Fish and Wildlife	220	Old P.O.	150	525	525
Air Force Reserve*	871	Old P.O.	375	1,313	1,313
Bureau Apprenticeship	347	Old P.O.	375	1,313	1,313
	118,808	$210,603	92,550	$323,925	$113,322

Present Area	118,808 ft.
Proposed	92,500 ft.
Area Reduced	26,558 ft.

*Reimbursable Agencies

Present rental cost	$210,603
Current Operating Cost, P. O. Bldg.	30,600
Total Cost	$241,203

	OE	*Reimbursable*	*Total*
Proposed Cost of Building	$286,212	$37,713	$323,925
Less Current Total Cost	241,203	—	241,203
Additional Funds Required	$ 45,009	$37,713	$ 82,722

III. *Action Requested*

Proposal 1. The attached layout has been reviewed and accepted by the Veterans Administration Regional Office Manager and the Chief Medical Officer; however, it is suggested that it be cleared with the VA Central Office. The layouts of the various components of the Department of Agriculture have also been cleared locally, but we suggest that these should also be cleared with Mr. Mackey White. No part of the project has been cleared by the Central Offices of the agencies involved as to reimbursable commitments for funds. ASC space is generally considered reimbursable. However, since this agency is being moved from Government-owned into leased space, there is doubt as to the responsibility of cost in this instance. Please let us have a ruling on the matter. Program and fund approval is requested to consolidate the twelve agencies into a new leased fa-

cility at an increased QE-PBS cost of $45,009 per annum, presuming reimbursement as outlined above, effective July 1, 1962. A lease in excess of five years is not anticipated. It is also requested that authorization be granted to vacate and dispose of the Old Post Office Building.

Proposal 2. In the event that immediate disposition of the Old Post Office Building cannot be effected as the first proposal requires, we recommend that new space be obtained for the VA, SSS State Headquarters, and Farmers Home Administration. Additional funds in the amount of $60,122 would be required with $9,450 being reimbursable.

An early answer will be appreciated.

cc: 4 PL
4 PB-2
4 PRB